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OFFICE OF PETITIONS

In re Application of :
Tung et al. :
Application No.: 10/626,997 : **DECISION ON**
Filing or 371(c) Date: 07/25/2003 : **PETITION**
Attorney Docket Number: H0005304 :

This is a decision in response to the Petition to Revive an Unintentionally Abandoned Application, filed August 14, 2006. The petition requests withdrawal of the holding of abandonment, or alternatively revival of the application under 37 CFR 1.137(b). The petition is properly treated under 37 CFR 1.181 (no fee), and alternatively under 1.137(b).

This Petition under 37 CFR 1.181 is **dismissed**.

The petition under 37 CFR 1.137(b) is **granted**.

The above-identified application became abandoned for failure to timely and properly reply to the final Office action, mailed December 1, 2005. The Office action set a three (3) month period for reply. Extensions of time were available under 37 CFR 1.136(a).

The Office action was mailed to Applicant at the correspondence address of record, however, the Office action was returned to this office by the United States Postal Service ("USPS") on December 13, 2005.

Petition under 37 CFR 1.181

Applicant requests withdrawal of the holding of abandonment and in support of this request asserts that this Office erred by not informing Applicant that the Office action was returned to this Office by the USPS.

Applicable Law, Rules and MPEP

The MPEP 711.03(c)A, Petition To Withdraw Holding of Abandonment Based on Failure To Receive Office Action, provides

In Delgar v. Schulyer, 172 USPQ 513 (D.D.C. 1971), the court decided that the Office should mail a new Notice of Allowance in view of the evidence presented

in support of the contention that the applicant's representative did not receive the original Notice of Allowance. Under the reasoning of Delgar, an allegation that an Office action was never received may be considered in a petition to withdraw the holding of abandonment. If adequately supported, the Office may grant the petition to withdraw the holding of abandonment and remail the Office action. That is, the reasoning of Delgar is applicable regardless of whether an application is held abandoned for failure to timely pay the issue fee (35 U.S.C. 151) or for failure to prosecute (35 U.S.C. 133). To minimize costs and burdens to practitioners and the Office, the Office has modified the showing required to establish nonreceipt of an Office action. The showing required to establish nonreceipt of an Office communication must include a statement from the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received. A copy of the docket record where the nonreceived Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement. For example, if a three month period for reply was set in the nonreceived Office action, a copy of the docket report showing all replies docketed for a date three months from the mail date of the nonreceived Office action must be submitted as documentary proof of nonreceipt of the Office action. The showing outlined above may not be sufficient if there are circumstances that point to a conclusion that the Office action may have been lost after receipt rather than a conclusion that the Office action was lost in the mail (e.g., if the practitioner has a history of not receiving Office actions). (Emphasis supplied)

MPEP 711.03(c)

Analysis

A review of the petition reveals that the correspondence address in the petition differs from the correspondence address of record. As such, it is unclear whether Applicant is in a position to attest on a personal knowledge basis as to whether the office action was received at the correspondence address of record. Also, the copy of the docket records filed with the petition do not indicate that the Notice of Abandonment was received. As such, there are circumstances that point to a conclusion that the Office action may have been lost after receipt rather than a conclusion that the Office action was lost in the mail.

Accordingly, the petition to withdraw the holding of abandonment is dismissed.

The petition to revive under 37 CFR 1.137(b)

In response to the Office action, Applicant has filed a Notice of Appeal, and a Brief in support of the Appeal, along with the appropriate fees. Accordingly, the petition is granted.

The petition fee has been charged to deposit account 50-1063 as authorized in the petition.

The application file does not indicate a change of address has been filed in this case, although the address given on the petition differs from the address of record. A change of address should be filed in this case in accordance with MPEP 601.03. A courtesy copy of this decision is being mailed to the address noted on the petition. However, until otherwise instructed, all future correspondence regarding this application will be mailed solely to the address of record.

The application is being referred to Technology Center Art Unit 1621 for processing of the Notice of Appeal and Appeal Brief in due course.

Telephone inquiries concerning this matter should be directed to the undersigned at (571) 272-3232.



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